No. SC84953

IAN MCEUEN, by and through next friend GARY MCEUEN; and MISSOURI PROTECTION AND ADVOCACY SERVICES, INC.,

Appellants,

v.

MISSOURI STATE BOARD OF EDUCATION; and MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION,

Respondents.

Appeal from the Cole County Circuit Court of Missouri
Case No. 02CV324328
The Honorable Thomas J. Brown, III
Cole County Circuit Court Judge

APPELLANTS' REPLY BRIEF

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The trial court erred in granting Summary Judgment to Respondents and denying it to Appellants when it concluded that Senate Substitute for House Bill 2023 was constitutionally passed because SSHB 2023 was passed in violation of Article III § 21 of the Missouri Constitution in that the original purpose of HB 2023 was dramatically and substantively changed by the last-minute SSHB 2023 so that legislators were unaware of what they were voting for. The original purpose of HB 2023 was to reduce the scope of judicial review of decisions from administrative hearing panels concerning special education students. In the last week of the session that original purpose was unconstitutionally transmogrified by SSHB 2023 whose sole purpose was the repeal of Missouri's declared policy to maximize the capabilities of handicapped children. This last minute Senate Substitute for HB 2023 so caught wary legislators by surprise that they did not learn about the repeal of Missouri's maximizing policy until after they had voted for the bill which prompted sixty-six (66) members of the House who had voted for SSHB 2023 to sign a petition asking the Governor to veto it. The trial court further erred in failing to consider this evidence because it is relevant and admissible and discloses that

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POINT RELIED ON I

The trial court erred in granting Summary Judgment to Respondents and denying it to Appellants when it concluded that Senate Substitute for House Bill 2023 was constitutionally passed because SSHB 2023 was passed in violation of Article III § 21 of the Missouri Constitution in that the original purpose of HB 2023 was dramatically and substantively changed by the last-minute SSHB 2023 so that legislators were unaware of what they were voting for. The original purpose of HB 2023 was to reduce the scope of judicial review of decisions from administrative hearing panels concerning special education students. In the last week of the session that original purpose was unconstitutionally transmogrified by SSHB 2023 whose sole purpose was the repeal of Missouri's declared policy to maximize the capabilities of handicapped children. This last minute Senate Substitute for HB 2023 so caught wary legislators by surprise that they did not learn about the repeal of Missouri's maximizing policy until after they had voted for the bill which prompted sixty-six (66) members of the House who had voted for SSHB 2023 to sign a petition asking the Governor to veto it. The trial court further erred in failing to consider this evidence because it is relevant and admissible and discloses that legislators were fooled because the proscription found in Article III § 21 was violated.

What is the point of the constitutional provisions at issue here? What evil were they

designed to prevent? As noted by this court in *Cardinal Glennon and Children's Hospital v. Missouri*, 68 S.W.3d 412, 416 (Mo.banc. 2002), the limitation in the Missouri Constitution that no bill shall be so amended in its passage through either House so as to change its original purpose serves to facilitate orderly procedure, avoid surprise, and prevent logrolling where several matters that would not individually command a majority vote are rounded up into a single bill to ensure passage.

In *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 101(Mo.banc. 1994), this court stated that the constitutional provisions at issue here serve "to defeat surprise within the legislative process. It prohibits a clever legislator from taking advantage of his or her unsuspecting colleagues by surreptitiously inserting unrelated amendments into the body of the pending bill." In *National Solid Waste Management v. Director of the Department of Natural Resources*, 964 S.W.2d 818, 820 (Mo.banc. 1998), this court stated that the circumstances surrounding the passage of SB 60 are exactly those to which these constitutional limitations are addressed. "The section pertaining to hazardous waste management was part of a last-minute amendment about which even the most wary legislators could hardly have given their considered attention and about which concerned citizens likely had no input."

Respondents spend much of their time cataloging the standard phrases, for example, that a party challenging a statute's constitutionality bears a heavy burden (Respondent's Brief at 8). However, at no time do Respondents state that the purpose of the constitutional proscriptions at issue here is to prevent surprise within the legislative process. It is that

very evil which is at the heart of this case.

The Senate Substitute for HB 2023 was introduced in the Senate on Friday, May 10, 2002. It was presented to the House for a vote on Monday, May 13, 2002, the beginning of the last week of the session which would end four (4) days later on Friday, May 17, 2002, at 6:00 p.m. On May 13, 2002, the Monday of the last week of the legislative session, SSHB 2023 was adopted by the House 151-1. On that same day SSHB 2023 was truly agreed to and finally passed by the House of Representatives by a vote of 146-1. The Senate Substitute for HB 2023 was delivered to the Governor on May 14, 2002 (Petitioner's Opening Brief at 12).

The very next day, on Wednesday, May 15, 2002, a petition began circulating among members of the House of Representatives (L.F. 84-85). It is signed by sixty-six (66) of the representatives who voted to pass SSHB 2023. The petition states as follows: "We the undersigned members of the House of Representatives object to the handling of SS HB 2023. We urge the Governor to veto this measure and send this aforementioned bill to Interim Committee this summer for further study." (L.F. 84).

Thus, sixty-six (66) representatives who voted for SSHB 2023 on Monday signed the petition several days later urging the Governor to veto it. The mandated inference is that these representatives did not know that in SSHB 2023 was to be found a repeal of Missouri's maximizing policy. It is axiomatic that the representatives urged the Governor to veto the measure and send it to an Interim Committee for further study because the issue was new to them and had never been debated.

Of course the issue was new to them, for the validity of Missouri's maximizing statute had only months before been affirmed by the Missouri Court of Appeals in *Lagares v. Camdenton R-III School District*, 68 S.W.3d 518 (Mo.App. W.D. 2001). Rather than debate the issue openly, a small cabal organized to repeal the now revitalized maximizing policy without engaging in open and fair debate. This is evinced in the letter of Representative Bray to the Governor urging him to veto the petition. (L.F. 86). Representative Bray elaborates upon the feelings of outrage clearly felt by many representatives who had voted for a repeal of the maximizing policy without knowing it. In part, Representative Bray states:

> "This Senate Substitute was craftily maneuvered onto House Bill 2023 after it passed the House in the committee process in the Senate. Such an important decision involving the education of our children deserves to be considered through the committee process and not tacked on as the Senate Substitute. Had I known this Substitute was taking away maximum standards for special needs children, I never would have voted for it."

Thus, Representative Bray explicates why the other sixty-five (65) members of the House signed a petition urging the Governor to veto SSHB 2023. Representative Bray states that had she known what was in SSHB 2023 she never would have voted for it; the mandated inference is that the other sixty-five (65) representatives felt the same way.

Respondents note that the other ninety-seven (97) representatives did not request a veto nor object to the handling of SSHB 2023. (Respondent's Brief at 19). Petitioners

posit that the other representatives did not sign the petition urging the governor to veto SSHB 2023 because they did not have the opportunity to do so. The petition by its very date establishes that it began to circulate on Wednesday, two (2) days after the vote. The session ended at 6:00 p.m. on Friday. The end of the session was frantic and frenzied, as they all are. The fact that sixty-six (66) representatives took the time to learn what was really in SSHB 2023 and to sign a circulating petition attests to what Petitioners have referred to as their "outrage." Certainly, it is outrage as expressed by Representative Bray. Petitioners suggest that the reason the other ninety-seven (97) representatives did not request a veto is because they did not have the opportunity to sign the petition as they left town immediately upon the conclusion of the session.

Petitioners believe that the petition signed by the representatives and the letter of Representative Bray are extraordinary evidence which was improperly ignored by the trial court. Although this evidence was presented to the trial court, it studiously avoided any mention of it in its Findings of Fact and Conclusions of Law. Before this court, Respondents argue that the evidence is inadmissable. However, the cases they cite for this proposition are inapposite. Respondents argue that this crucial piece of evidence before the court should be ignored because "statements by members are neither conclusive nor persuasive evidence when courts are required to interpret a statute." (Respondents Suggestions at 9). Respondents' cite for this proposition *Missourians for Honest Elections v. Missouri Elections Commission*, 536 S.W.2d 766, 775 (Mo.App. 1976). That case has no application here. *Missourians for Honest Elections* says simply as follows:

> "Despite the evidence of the Plaintiffs showing an intent that the law was not intended to include 'small candidates,' it must be held that once a law has been adopted, whether through legislative enactment or the initiative procedure, and its provisions are express and unambiguous, we are not at liberty to construe the language of an act or the words embodied therein in accordance with the intentions of its supporters or opponents. The function of the courts is to enforce the law according to its terms."

It is to be emphasized that Petitioners are not asking this court to construe SSHB 2023. The meaning of SSHB 2023 is not at issue. The statute as amended and passed and signed by the Governor is clear. If it is found to be constitutionally passed, there will be no argument from Petitioners that it did not repeal the maximizing standard. This court is not called upon to construe the statute. This court is not called upon to determine what the intent of the words are designed to achieve.

Since the issue before this court has nothing to do with the statutory construction of SSHB 2023 and what it may mean and what the intent of the drafters thereof may have been, the citation of Respondents to *Missouri National Association v. Missouri State Board of Education*, 34 S.W.3d 266, 280 (Mo.App. 2000), is equally inapposite. In that case the court stated that "statements and representations made prior to an enactment of the law by its supports or opponents are not admissible if the language in the statute is clear and unambiguous." Once again, the issue before the court in *Missouri National Education Association* was the interpretation of a statute by the court to ascertain its intent.

This is not an intent case. This is a case exclusively concerning whether the statute SSHB 2023 was unconstitutionally passed. The evidence before this court deals exclusively with whether legislators felt surprised and mislead by the amendment's title and change in purpose of HB 2023. By virtue of the evidence, this court need not ask itself whether it thinks SSHB 2023 could surprise or mislead the "average legislator," because those very legislators have told the court that it did mislead and surprise them.

After having urged the ignorance of this evidence, Respondents rely upon *Stroh Brewery Co. v. State of Missouri*, 954 S.W.2d 323 (Mo.banc 1997). Respondents urge this court to compare the facts in *Stroh* to the facts in this case. (Respondent's Brief at 13). Petitioners urge this court to do the same because they believe that *Stroh* supports the conclusion that SSHB 2023 was passed in violation of the Missouri Constitution. The trial court cited *Stroh* noting that this court considered a bill that had nine (9) additions during the legislative process and held it to be constitutionally passed (L.F. 132-133). In *Stroh* this court noted that the provisions contained in the original bill related only to the auctioning of vintage wine, but the title of the bill was not so limited as it stated that it was an act "to amend Chapter 311 ...." *Id* at 326. When amendments were made to the original bill the legislators were on fair notice that they may include subjects different from those mentioned in the original because the title indicated that all of Chapter 311 was subject to amendment. *Id.* This court stated that all subsequent versions of the bill amended Chapter 311 and thus were germane to an act to amend Chapter 311. Thus, this court concluded that the purpose of the original bill had been consistent throughout its legislative history.

In the instant case the title of HB 2023 reads as follows: "to repeal §§ 162.961 and 162.962, RSMo., and to enact in lieu thereof two (2) new sections relating to resolution conferences" (L.F. 77). The title puts no legislator on notice that anything other than these two (2) specific sections are subject to HB 2023. There is no mention of an entire chapter being subject to amendment, like there is in *Stroh*. Similarly, the Senate Substitute for HB 2023 has as its title the following: "To repeal §§ 162.670, 162.675, 162.961, and 162.962, RSMo., and to enact in lieu thereof four (4) new sections relating to the appropriate educational placement of students" (L.F. 80). The title of the Senate Substitute for HB 2023 gives no indication that the original purpose of HB 2023, to restrict judicial review of an administrative hearing, had been transmogrified to include a change in the declared policy of the state of Missouri to all children with disabilities who are in need of special education services. Rather than supporting the position of the trial court, *Stroh* argues against it.

Next, Respondents argue that the changes made to HB 2023, as found in SSHB 2023, are no more extraordinary than the changes in *Missouri State Medical Association v. Missouri Department of Health*, 39 S.W.3d 837, 840 (Mo.banc. 2001). In *Missouri State Medical*, HB 191, as introduced, indicated an original purpose to mandate health services for serious illnesses, including cancer. As enacted, HB 191 required that physicians tell patients about the advantages, disadvantages, and risks, including cancer, of breast implantation. This court found that the original purpose logically related to mandating pre-operation information about the risks of breast implantation, including

cancer. This court said that the sections on breast implantation are germane to the original purpose of HB 191. Indeed, mandating health services for serious illnesses is reasonably related to requiring pre-operation information about the risks of breast implantation, including cancer.

In the instant case the original purpose dealt with insulating due process hearing panel decisions from judicial scrutiny. As enacted, SSHB 2023 returned to the judiciary many of its powers of review, but added a section which repealed Missouri's maximizing policy for children with disabilities. The question before this court is whether the scope of judicial review for an administrative hearing and the policy of the state for the education of the disabled are reasonably related; or, are they distinct and unique so that the inclusion of the repeal tricked representatives into voting for it. That is the question before this court. The petition by sixty-six (66) representatives answers it to the satisfaction of Petitioners.

POINT RELIED ON II

The trial court erred in granting Summary Judgment to Respondents and denying it to Appellants when it concluded that Senate Substitute for House Bill 2023 was constitutionally passed. The trial court erred because SSHB 2023 was passed in violation of Article III § 23 of the Missouri Constitution in that the title thereto was under-inclusive in that it did not fairly apprise legislators that the bill repealed Missouri's declared policy to maximize the capabilities of handicapped students. The title to SSHB 2023 states only that it relates "to the appropriate educational placement of students." Contrary to the use of the word "placement" in

its title, the sole purpose of SSHB 2023 had nothing to do with placement. Its sole purpose was to repeal Missouri's declared policy to maximize the capabilities of handicapped students. The title of SSHB 2023 refers to the locale where services are to be delivered when in fact the declared policy of the state, which was repealed by SSHB 2023, relates exclusively to the services to be delivered to handicapped students regardless of locale. Because the proscription found in Article III § 23 was violated, wary legislators did not learn that they had voted for the repeal of Missouri's maximizing policy until afterwards, prompting sixty-six (66) members of the House to sign a petition asking the Governor to veto SSHB 2023. The trial court further erred in failing to consider this evidence because it is relevant and admissible and discloses that legislators were fooled because the proscription found in Article III § 23 was violated.

Petitioners argue that the trial court erred prejudicially when it concluded that the title of SSHB 2023, "relating to the appropriate educational placement of students," was broad enough to put legislators on notice that the thirty (30) year policy of the state to maximize the capabilities of students with special education needs had been repealed. Petitioners argue that such a title, with the use of the word "placement," does not put the wary legislator on notice that the declared policy of the state of Missouri to maximize to the highest degree the capability of students who are disabled was to be repealed. Such a declared policy relates to the type of services to be provided to the special education student regardless of placement. A maximizing program has to do with the type, level, and

intensity of services provided, not the locale for the provision of those services. Thus, the trial court failed to distinguish between the types of services mandated by a maximizing policy and the locale where those services are to be delivered.

In response, Respondents state that there is case law suggesting that as used in the federal law, the Individuals with Disabilities Education Act, that the phrase "educational placement" does not involve the physical location of the services to the student but the type of services provided the student. (Respondent's Brief at 11, 16). Thus, Respondents implicitly argue that the wary legislator is presumed to be familiar with a 1980 federal case law emanating from New York. Such a wary legislator, according to the argument of Respondents, should know that in the year 1980 the phrase "educational placement" was defined by a New York federal court to mean the types of services to be provided and not their locale. In reply, Petitioners utilize recent and current case law on this issue from the Eighth Circuit in a case out of Missouri.

In *Hale v. Poplar Bluff R-I School District*, 280 F.3d 831, 833-834 (8th Cir. 2002), the court noted that the phrase "educational placement" in the Individuals with Disabilities Education Act is not defined. In fact, in the case before it, the Eighth Circuit concluded that moving the location of the special education services changed the "educational placement." The court did note that prior cases seemed to disagree on whether a mere change in location was a change in educational placement. The Eighth Circuit found the conflict more apparent than real. It stated that a transfer to a different school building for fiscal or other reasons unrelated to the disabled child has generally not been deemed a

change in placement, whereas an expulsion from school or some other change in location made on account of the disabled child or his behavior has usually been deemed a change in educational placement that violates the stay-put provision if made unilaterally.

The phrase "educational placement" is not defined by the Individuals with Disabilities Education Act. Even if the wary legislator knew that the phrase "educational placement" he saw in the title of SSHB 2023 was used in the Individuals with Disabilities Education Act, he could not have found a definition for it there. A reasonable legislator could have concluded justifiably that the word "placement" carried its obvious meaning of location. Even if he had checked recent case law, a wary and reasonable legislator would have learned that the Eighth Circuit concluded that a change in location made on account of behavior had been deemed a change in educational placement. Such a legislator would have felt confident that the title of SSHB 2023, with the phrase "educational placement" referred to matters concerning the location of special education services, not the type and level and intensity of those services. Yet, Respondents would have us believe that a 1980 case from a federal court in New York should have alerted the reasonable legislator to the possibility that the use of the phrase "educational placement" in the title of SSHB 2023 meant that type of special education services and not the location thereof were the subject of the bill. As demonstrated, such an argument is without merit.

Axiomatically, the maximizing policy of the state of Missouri refers to the type of services provided to the disabled student. Petitioners' argument, therefore, remains valid. The use of the phrase "educational placement" in SSHB 2023 could have alerted the

reasonable and wary legislator only that the location of services was the subject of the bill and not what types of services were to be provided. Because the title of SSHB 2023 was under-inclusive it did not alert the legislators that the declared policy of the state of Missouri for thirty (30) years was to be repealed without debate.

Finally, Respondents argue that Petitioners are asking this court to violate the separation of power doctrine and repeal legislation they believe is ill-conceived and misguided. This is not true. The purpose of this lawsuit is to ensure that democratic principles are followed and that fair and open debate is required before a bill is voted upon. Sneak attacks, crafty maneuvers, and surprise are outlawed by the Missouri Constitution. Petitioners urge the declaration that SSHB 2023 is unconstitutional not because they do not like the repeal of the maximizing standard, but because they do not like the way in which the bill was snuck through the legislature. If open and honest debate had resulted in the repeal of the maximizing standard there would be no lawsuit.

This is an important lawsuit. It deals with legislation affecting all handicapped children. Such legislation deserves to be debated. The parents of children with disabilities deserve the opportunity to have input on this matter and the chance to tell their representatives how they feel about it.

It is the evil of deceit and the corruption of the democratic process which Petitioners seek to rectify.

CONCLUSION

WHEREFORE, in light of all the foregoing, Appellants respectfully request that this

court declare that SSHB 2023 was passed unconstitutionally, because: (1) it violated the original purpose provision of Article III, § 21 of the Missouri Constitution; and (2) it violated Article III, § 23 of the Missouri Constitution in that its title did not clearly reflect what was contained within the bill. Appellants state that they have no objection to this court severing from the unconstitutional SSHB 2023 those sections which were the subject of the original HB 2023 - §§ 162.961 and 162.962. Appellants further request that upon finding that the SSHB 2023 was unconstitutionally passed this court award to them their costs, expenses, attorney's fees, and issue other orders that are meet in the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was hand-delivered, to the office of the attorney of record at the address set out below, on this 15th day of May, 2003.

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The undersigned certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 4,598 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus free.

_____
Michael H. Finkelstein